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No. 964

In the

Supreme Court of the United States

OCTOBER TERM, 1968

In the Matter of: THE DANIA CORPORATION

INTER NATIONAL BANK OF MIAMI,
Petitioner,

vs.

J. H. BROCK, Trustee, and THE DANIA CORPORATION,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-9) is reported at 400 F.2d 833. No opinion was rendered by the district court. Its order authorizing the sale of 124,560 shares of the capital stock of the Dania Bank (Pet. App. 11) is not reported. However, the decision reserved was entered and the opinion of the court of appeals therein is reported at 402 F.2d 269.

JURISDICTION

The judgment of the court of appeals was entered September 17, 1968. A petition for rehearing was denied October 28, 1968. The court of appeals' judgment on the matter reserved was entered November 5, 1968, and no petition for rehearing was filed. The petition for a writ of certiorari was filed on January 21, 1969. The jurisdiction of this Court is invoked under 11 U.S.C., Section 47; 28 U.S.C., Section 1254(1), and 28 U.S.C., Section 2101.

STATUTE INVOLVED

Section 116 of the Bankruptcy Act [July 1, 1898, c. 541, 11 U.S.C., Sec. 516] specifically subdivision 3 thereof, provides:

> "Upon the approval of the petition the judge may, in addition to the jurisdiction, powers and duties in this chapter conferred and imposed upon him and the court—
>
> * * *
>
> "(3) authorize a receiver or a trustee or a debtor in possession, upon such notice as the judge may prescribe and upon cause shown, to lease or sell any property of the debtor, whether real or personal, on such terms and conditions as the judge may approve; * * *"

STATEMENT

On January 25, 1966 the debtor, The Dania Corporation, filed a voluntary petition seeking relief under Chapter X of the Bankruptcy Act (R. 9). On that same date an Order of Consolidation was entered by the United States District Court for the Southern District of Florida, the Honorable W. O. Mehrtens presiding, consolidating the three debtor estates (R. 23). The Order of Consolidation recognized the

involved inter-relationship of the debtor, involved in this appeal, with two other debtors, to-wit: The Wingreen Company and The Lake Worth Company.

One Garvice D. Kincaid, on behalf of himself and the Lexington Finance Corporation, filed a Motion to Vacate the Order of Consolidation, and subsequently amended the same (R. 24 and 56). At the same time Mr. Kincaid, on behalf of himself and Lexington Finance Corporation, filed a Motion to Dismiss the proceedings as to The Dania Corporation (R. 30). Creditors of the three corporations filed their respective motions seeking to dismiss the proceedings and vacate the Order of Consolidation; however, the appellant, the Inter National Bank of Miami, was not among these creditors (R. 42 through 46, inclusive; 46 and 63).

On March 31, 1966 Garvice D. Kincaid filed his claim to receive dividends previously declared by the Dania Bank on stock held by The Dania Corporation, and upon which stock Kincaid, either individually or as agent, held secondary collateral security (R. 74).

The Trustee responded to the petition (R. 79) and Kincaid caused a reply to be filed to the Trustee's response (R. 82).

Inasmuch as the reorganization court had not made any ruling as to the good faith of the voluntary petitions filed, the receiver for The Dania Corporation (the present Trustee) filed a report under Section 167 of the Bankruptcy Act [11 U.S.C.A. § 567] which covered the financial condition of The Dania Corporation (R. 269-291), The Wingreen Company (R. 107-269, 292-295), and The Lake Worth Company (R. 253-268).

After lengthy hearings the court entered its Order denying the Motion to Vacate the Order of Consolidation (R. 296), and in addition thereto, on May 24, 1966, entered

its Order Finding Good Faith and Appointing a Trustee, etc. (R. 209).

Garvice D. Kincaid, on behalf of himself and as agent, feeling aggrieved by both Orders, i.e., the Order denying the vacating of the Order of Consolidation and the Order Finding Good Faith, lodged an appeal on June 3, 1966 directed to both Orders (R. 332).

The Trustee, in the administration of the estate, filed his Report under Section 167(1) of the Bankruptcy Act [11 U.S.C.A. § 567(1)]. Said Report contained an analysis of the book value of the common stock of the Dania Bank held by The Dania Corporation (R. 346-349; 354-355), and the status of the secured indebtedness owed by The Dania Corporation for which all of said stock was pledged in portions (R. 346-349).

This Report reflected that the Trustee's indebtedness as concerned the 174,893 shares of the common stock of the Dania Bank held by the debtor was evaluated (cost of acquisition) at $5,848,973.30 (the fair market value of the stock on the date of the report was far less than the book value maintained on the books and records of the debtor). The indebtedness owed by the debtor, all of which was collateralized by the 174,893 shares, with interest as of December 20, 1966, totalled $5,588,873.85 (R. 382). The principal indebtedness, without interest, was $5,330,634.29 (R. 349).

After much consideration the Trustee, on January 3, 1967 filed his report concerning the possibility of reorganization of the debtor and the consolidated companies (R. 366-381). This report recognized the severe financial burden that the secured indebtedness of The Dania Corporation created in the administration of the consolidated proceedings, and gave an insight into the daily accruing interest which the secured indebtedness created.

The Trustee filed a petition to determine stockholder's equity in The Dania Corporation stock (R. 381), and the court issued its Rule to Show Cause, which was addressed to all stockholders and others materially and adversely affected by the proceedings as they involved The Dania Corporation (R. 384).

On January 6, 1967 the Trustee petitioned the court for the entry of a Rule to Show Cause as to why the Trustee should not dispose of 124,560 shares of the Dania Bank stock in accordance with the terms of an offer submitted by the Investment Securities Corporation (R. 393); the reorganization court issued its Rule on said petition and an Amended Rule thereon (R. 400 and 401).

The Trustee filed a petition for leave to abandon various and sundry executory contracts involving stock pledges of the Dania Bank stock (R. 405), and the court issued its Rule to Show Cause thereon (R. 421).

All parties entitled to receive notice in accordance with the court's direction were served in the manner provided for, and the publication ordered by the court was had (R. 421).

The Inter National Bank of Miami filed its response to both Rules, i.e., the Rule to Show Cause why the Trustee should not sell 124,560 shares of the Dania Bank stock to Investment Securities Corporation, and the additional Rule as to why the Trustee should not reject the executory contract involving the Inter National Bank of Miami and the collateral it held (R. 422 and 426—both responses filed January 16, 1967).

On the return date of the Rules, to-wit: January 19, 1967, a hearing was held in open court and Inter National Bank of Miami, through its counsel, presented argument but no evidence or testimony (R. 513-520).

On January 24, 1967 the court entered its Order finding no equity for the stockholders of The Dania Corporation (R. 440), and subsequent to the expiration of time in which the court afforded parties the opportunity to present memorandum, the court entered its Orders authorizing the rejection of the executory contracts, one of which involved the Inter National Bank of Miami. Said Order was filed January 30, 1967 at 1:56 p.m. (R. 449).

On January 31, 1967 at 10:24 a.m. the court filed its Order confirming the sale of the 124,560 shares of the Dania Bank stock to Investment Securities Corporation (R. 455); which contained the following findings of fact:

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1. That on January 25, 1966, this Court entered its Order consolidating the hereinafter enumerated causes to be administered as a consolidated cause:

a. THE WINGREEN COMPANY, a Florida corporation, Debtor, case No. 66-28;

b. THE DANIA CORPORATION, a Florida corporation, Debtor, case No. 66-29;

c. THE LAKE WORTH COMPANY, a Florida corporation, Debtor, case No. 66-30.

On May 4, 1966, this Court entered its Order denying Motions addressed to vacate the Order of consolidation previously entered.

On May 23, 1966, this Court entered its Order approving the Debtor's Petitions for reorganization under Chapter X, including a finding of good faith, and did appoint J. H. BROCK, Trustee of THE WINGREEN COMPANY, Debtor, THE DANIA CORPORATION, Debtor and THE LAKE WORTH COMPANY, Debtor.

1. That these instant proceedings since January 25, 1966, are consolidated proceedings and the assets herein are administered on a consolidated basis.

2. By virtue of these proceedings, the Court has jurisdiction over the subject matter and the parties hereto.

3. That with the exception of the Inter National Bank of Miami, none of the parties who received service as designated interested parties materially and adversely affected by these proceedings entitled to receive service, have filed any responsive pleadings to the Petition upon which the Rule to Show Cause dated January 6, 1967, did issue, nor did any of the parties, with the exception of the Inter National Bank of Miami, file any reply to the Rule to Show Cause issued January 6, 1967.

In addition to the foregoing, the Inter National Bank of Miami filed an amendment to its response addressed to

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Footnote 1, continued:

4. That this Court has previously entered its Order decreeing that no equity assets (sic) for any stockholders of the common capital stock of the Dania Corporation nor any equity for parties collaterally claiming an interest in the stockholders' rights in and to the said stock held by said stockholders of stock.

5. On August 3, 1966, Garvice D. Kincaid, as nominee and agent for Lexington Finance Company, and Lexington Finance Company, a corporation organized under the laws of the State of Kentucky, did file its proof of claim (alleging security) in an amount of $737,059.17, together with interest thereon at the rate of 5 3/4% per annum and reasonable attorney's fees. Said proof of claim alleged a second lien on 124,560 shares of the common capital stock of the Dania Bank, said proof of claim being assigned No. 274 D.

6. The Florida National Bank at Jacksonville is a secured creditor in an amount of $2,855,250.00 (representing a principal in the amount of $2,700,000.00 and interest as of December 31, 1966, in an amount of $155,250.00), and that the said Florida National Bank of Jacksonville does hold as security for the repayment of said indebtedness 114,000 shares of the capital stock of the Dania Bank.

7. That the Citizens National Bank of Orlando is a secured creditor in a total amount of $288,750.00 (said indebtedness consisting of $275,000.00 principal and interest as of December 31, 1966, $13,750.00), the repayment of which indebtedness is secured by a pledge of 10,560 shares of the common capital stock of the Dania Bank.

8. That on March 4, 1966, the Dania Bank declared a dividend of 25 cents per share payable March 15, 1966, and did, in fact, pay said dividend to J. H. BROCK, the Trustee, on 124,560 shares of the common capital stock of the Dania Bank, said dividend totaling $31,140.00.

On or about March 29, 1966, Garvice D. Kincaid, did make and file his claim to said dividends and the Trustee, by and through his attorney, did, on April 5, 1966, respond to said claim to dividends heretofore filed by the said Garvice D. Kincaid, and that said matter was in issue.

On October 24, 1966, the deposition of the said Garvice D. Kincaid was taken and had in these proceedings and filed accordingly.

9. GARVICE D. KINCAID, as nominee and agent for Lexington Finance Company, and LEXINGTON FINANCE COMPANY, did file for joint Appeal on June 3, 1966, addressed to the Order entered by the Honorable W. O. Mehrtens, U. S. District Judge, dated May 4, 1966, and filed May 5, 1966, entitled Order Denying Motions to Vacate Order of Consolidation, and did further file their Notice of Appeal from the Order of the Honorable W. O.

the Rule to Show Cause concerning the rejection of the executory contracts (January 31, 1967—10:38 a.m., R. 483).

Footnote 1, continued:

Mehrtens dated May 23, 1966, and filed May 24, 1966, entitled Order Approving Debtor's Petition for Reorganization under Chapter X—Finding of Good Faith and Appointing Trustee, and in addition thereto, did file their Notice of Appeal dated July 1, 1966, from the Order entered by the Honorable W. O. Mehrtens dated June 3, 1966, and filed June 3, 1966, entitled Order Approving Final Reports of Respective Receivers and Awarding Fees to the Receivers and Their Attorneys, and three Appeals being addressed to the U. S. Court of Appeals, Fifth Circuit.

That said Appeals were perfected by the filing of statement of points on Appeal and directions to the Clerk of the U. S. District Court designating by Stipulation parts of the record to be transmitted. That in addition thereto, Motions to extend time for the filing of the record on Appeal and docketing the Appeal were filed and Orders obtained thereon; directions to the Reporters to prepare the necessary transcripts were also had and transcripts of the proceedings subjected to the foregoing Notices of Appeal were completely transcribed.

10. That THE WINGREEN COMPANY, a Debtor in these consolidated proceedings, by and through the Trustee, J. H. BROCK, is an unsecured creditor in an amount of $520,000.00 plus accrued interest.

11. That 100 shares of the capital corporate stock of the Dania Corporation, Debtor in these consolidated proceedings, are listed and registered in the names of Mr. and Mrs. BURTON D. GREENFIELD and 100 shares of the capital corporate stock of the Dania Corporation, Debtor in these consolidated proceedings, are listed and registered in the names of Mr. and Mrs. DANIEL I. WINCOR. Said aforementioned party stockholders, by virtue of this Court's previous Order, do not possess any right, title, interest, legal or equitable, in said shares.

12. That the Dania Corporation, a Debtor in these consolidated proceedings, was possessed of one sole asset subject to the hereinbefore and hereinafter enumerated encumbrances, to-wit: 174,893 shares of the capital corporate stock of the Dania Bank. However, this Court has previously entered its Order authorizing the Trustee to reject the executory contracts involving the Inter National Bank of Miami, the American National Bank of Jacksonville and United Security Life Insurance Company; thus, the only sole and remaining asset of the Dania Corporation, a Debtor in these consolidated proceedings, is 124,560 shares of the common capital stock of the Dania Bank.

The stock, subject to the rejected executory contracts, totaled 50,333 shares in number, which were subjected to a purchase agreement with United Security Life Insurance Company (40,653 shares) for which an unpaid balance of the purchase price totaled $1,321,549.00 plus accrued interest; 5,000 shares were subject to a pledge agreement with the American National Bank of Jack-

Even though the Inter National Bank of Miami offered no testimony or no evidence at the hearing of January 19, 1967, it did file, on February 9, 1967 (twenty-one

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Footnote 1, continued:

sonville, to secure an indebtedness of $165,000.00 plus accrued interest, and 4,680 shares were pledged to the Inter National Bank of Miami to secure an indebtedness of $100,000.00 plus accrued interest.

13. On December 22, 1966, Investment Securities Corp. offered to purchase 124,560 shares of the common capital stock of the Dania Corporation from the Trustee under the terms and conditions enumerated in said offer, which is attached hereto and made a part hereof as Exhibit "A".

14. On December 27, 1966, the Trustee accepted said offer subject to Court Approval. Attached hereto is Exhibit "B" and made a part hereof is said conditional acceptance.

15. On January 6, 1967, the Trustee filed his petition for the entry of a Rule to Show Cause why the offer of Investment Securities Corp. should not be presented to the reorganization Court for confirmation and approval, and in response to said Petition, this Court did on January 6, 1967, issue its Rule to Show Cause.

16. That all parties materially and adversely affected by these proceedings and such other parties did receive adequate and complete notice in accordance with the provisions of the Acts of Congress relating to Bankruptcy, and in accordance with the provisions of the Rule to Show Cause, and that the publication of the Rule to Show Cause, as provided for therein, was had, a proof of said publication having been filed heretofore in these consolidated proceedings.

17. The Response filed by Inter National Bank of Miami appears, on its face, to be without merit and unreasonable in that said Bank admittedly would not object to the sale if the stock held by said Bank as collateral was included in the sale in order that the debt to the said Bank would be paid. The Bank apparently desires only to have its stock included in the proposed offer. It is also apparent that the proposed offer does not extend to, nor include, stock held by the Inter National Bank of Miami. The Response of the Inter National Bank of Miami and the argument of its counsel fortify the Trustee's recommended sale in that they directly acknowledge the terms, conditions and price for the sale of the stock are so advantageous that the Inter National Bank of Miami desires its stock to be included in such sale. It, therefore, appears that the Trustee has adequately performed his duty in obtaining an offer for the purchase of 124,560 shares of The Dania Bank stock under the terms, conditions and selling price most favorable and advantageous to the Debtor. It further appears from the record herein that if the Court approves the sale to Investment Securities Corp., Inter National Bank of Miami will not be affected in any material manner with respect to its position and its collateral. The status of the said Bank and its collateral before

days after the hearing and nine days after the entry of the Orders) a pleading, annexing copies of various and sundry agreements evidencing transactions by and between the Inter National Bank of Miami, The Wingreen Company and The Dania Corporation (R. 486-511). These agreements were never introduced into evidence, were never submitted to a *voir dire* examination, were never authenticated or proven. They appear to be filed as an afterthought of counsel.

Footnote 1, continued:

the commencement of these proceedings will, in the opinion of the Court, remain the same. It further appears from the record that the debt held by the Inter National Bank of Miami was originally an unsecured debt when made on or about July 23, 1965, and was not secured until on or about October 24, 1965, at which time the said Bank received a pledge of 4,680 shares of The Dania Bank stock. The rights of the said Inter National Bank of Miami have never been more than to be secured by 4,680 shares of The Dania Bank stock, and the value of the said security has never been more than whatever the said number of shares might sell for from time to time in the market.

18. That the attorney for Investment Securities Corp. has advised the Court that the Commissioner of Banking for the State of Florida has approved the acquisition by his client of 124,560 shares of capital stock of The Dania Bank and authorized the consummation thereof.

19. The written offer of Investment Securities Corp., as purchaser, attached to the petition of the said Trustee and accepted by the Trustee subject to this Court's approval, is a fair and reasonable offer for 124,560 shares of the capital stock of the Dania Bank, and that it is to the best interest of the Debtor's estate to approve the said sale.

20. That the consummation of the sale as proposed by the Trustee would realize substantial equity to the Debtor and, in turn, be of substantial benefit to the Debtor's creditors in that under the proposed sale:

(a) The Debtor's estate would retain $31,140.00 received as dividends on 124,560 shares of The Dania Bank stock now subject to the claim of Lexington Finance Company;

(b) The Debtor's estate would receive an additional $75,000.00 cash;

(c) The Debtor's estate would be relieved of a burdensome debt exceeding the amount of $3,923,440.00 on which interest is accumulating daily; and

(d) The Debtor's estate would be relieved of the costs and expense of defending presently pending appeals.

The court of appeals affirmed the action of the trial court, ruling that the trial court had made sufficient findings of fact and complied with the requirements of the statute.[2]

ARGUMENT

The court of appeals' construction of Section 116(3) of the Bankruptcy Act [11 U.S.C.A. § 516(3)] is clearly correct and its decision is not in conflict with any other decision rendered by any other circuit, and therefore further review is unnecessary.

The petitioner argues that the decision of the court of appeals is in conflict with *In re Pure Penn Petroleum Co.*, (2nd Cir. 1951) 188 F.2d 851. This is a bad analogy.

Pure Penn is a Chapter XI arrangement proceedings [Sections 301-399, inclusive, of the Bankruptcy Act; 11 U.S.C.A. §§ 701-799]. It must be conceded that Chapter XI arrangement proceedings possess standards not applicable to Chapter X proceedings [Sections 101-272; 11 U.S.C.A. §§ 501-672]. However, *Pure Penn Petroleum, supra*, was not given the interpretation placed upon it by the petitioner. [See *In re Northern Illinois Development Corp.*, (7th Cir 1963) 324 F.2d 104 at 108, cert. den. 376 U.S. 938, 84 S.Ct. 792, 11 L.Ed.2d 658 (1964).] It will be noted that the Court of Appeals for the Seventh

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2. "We find that the District Court properly ordered the sale of the debtor's assets under the circumstances outlined in its findings of fact. Even if no 'emergency' situation existed here, as that word is normally used, there was certainly just cause shown to warrant the sale of these shares of stock for the reasons given by the District Judge in his finding of fact numbered 20. This is all that is required by statute." [*In re Dania Corp., Debtor, Inter National Bank of Miami* v. *J. H. Brock*, 400 F.2d 833 at 837 (1969, 5th Cir.)].

Note: Paragraph 20 referred to in said decision is not restated inasmuch as it appears verbatim as a portion of Footnote 1, *supra*.

Circuit approved the sale of all of the assets of a debtor during a Chapter XI arrangement proceedings where the requisite "emergency" was a disastrous financial condition and experience affecting the sole asset of the debtor [*In re Northern Illinois Development, supra,* at 107].

However, it appears that the reorganization court's jurisdiction in Chapter X proceedings is more comprehensive since with the approval of a petition such court acquires additional jurisdiction, i.e., that jurisdiction which a court of the United States would have if it had appointed a receiver in equity for the property of the debtor [Section 115, Bankruptcy Act—11 U.S.C.A. § 515].

In a Chapter XI proceeding a bankruptcy court deals only with the realignment of claims of unsecured creditors.[3]

The verbiage of Section 116(3) of the Bankruptcy Act is clear, concise and unambiguous. It does not establish as a prerequisite for a sale of the assets of a Chapter X debtor a condition of emergency or perishability.

The petitioners' reliance upon *Solar Manufacturing Corp.*, (3rd Cir. 1949) 176 F.2d 493, in its effort to establish a diversity of opinion amongst the circuits is not appropriate. Observe the following language used by Circuit Judge Goodrich:

> "We think that sales under court order not in pursuance of a reorganization plan are to be confined to emergencies where there is imminent danger that the assets of the ailing business will be lost if prompt action is not taken." [*In re Solar Manufacturing Corp., supra,* at 494].

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3. Compare Section 313 of the Bankruptcy Act [11 U.S.C.A. § 713] with Sections 115 and 116 of the Bankruptcy Act [11 U.S.C.A. §§ 515 and 516].

Compare this language with that of the Opinion by Judge Scott in the instant matter [Footnote 2, *supra*].

The inherent jurisdiction of a reorganization court contains authority to lease or sell any property of the debtor at any time during the administration of the debtor's estate and assets during a reorganization proceedings, provided the assets are sold in accordance with terms and conditions governed by appropriate court order commensurate with the existing circumstances of each case [*Marathon Foundry and Machine Company* v. *Joseph Schwarz*, 228 F.2d 594 at 598 (7th Cir. 1955), cert. den. 305 U.S. 1014, 76 S.Ct. 689, 100 L.Ed. 874 (1956); *Frank* v. *Drinc-O-Matic, Inc.*, 136 F.2d 906 (2nd Cir. 1943); *In re Northern Illinois Development Corporation*, 324 F.2d 104 at 108 (7th Cir. 1963); *Kansas and Tennessee R. Co.* v. *May*, (1904) 194 U.S. 267, 24 S.Ct. 638, 48 L.Ed. 971; *6 Collier on Bankruptcy*, 14th Ed. 1968, pp. 621-632].

A clear and concise statement of the law accepted in a majority of the circuits and in accord with the applicable theory of the law involved was made by Judge A. N. Hand of the Court of Appeals for the Second Circuit in the following language:

> "The appellant lays great stress upon the fact that here the sale was of all income-producing property of the debtor, and hence was likely to prevent the adoption of any plan of reorganization and to defeat the very purposes of the reorganization proceedings. But the disposition of the property could not be longer delayed without peril to all interests. The properties were wasting assets and Section 116(3) of the Chandler Act authorizes sale of 'any' of them . . . There is no requirement in the Chandler Act that the sale be in aid of reorganization or that it await a liquidation in straight bankruptcy." [*In re V. Loewers Gambrinus Brewery Co., Inc.*, 141 F.2d 747, at 749 (2nd Cir. 1944)].

The opinion of Justice Roberts in *Fidelity Assurance Association* v. *Sims*, 318 U.S. 608, 63 S.Ct. 807, 87 L.Ed. 1032 (1943), is not in conflict and does not hold to the contrary. The Sims opinion clearly reflects the congressional intention that Chapter X proceedings found to have commenced in good faith are not a bar to preclude liquidation, therein. The Act only operates to preclude liquidation in a Chapter X proceeding where good faith is not found at the outset [*Sims, supra,* at 621, 622].

The petitioners' reliance upon *Protective Committee for Independent Stockholders of TMT Trailer Ferry, Inc.* v. *C. Gordon Anderson, Trustee,* ..... U.S. ....., 88 S.Ct. 1157, 20 L.Ed.2d 1 (1968), does not avail the petitioners any sustenance. There the district court failed to enter sufficient findings of fact to support the compromise of claims, and it did further fail to reevaluate the stockholders' position at the time the plan of reorganization was confirmed.

A comparison of the factual situation leaves the instant matter and *TMT, supra,* irreconcilable. Mr. Justice White's observation in *TMT, supra,* when compared with the factual situation of the instant case, magnifies and classifies the divergence of the comparable problems present in both cases.

> "However, examination of the facts of this case demonstrates that the district court did not have before it all of the evidence and testimony relating to the future problems and prospects of the company which was necessary to assess its value as a going concern. Indeed, the trial judge steadfastly refused to consider the value of the company once it was out of reorganization proceedings. In this there was error, and it was an error which affected the conclusions of the trial court that the debtor was insolvent. Evaluations of evidence reached by the accurate application of erroneous legal standards are erroneous evaluations." [*TMT, supra,* at 88 S.Ct. 1173].

CONCLUSION

For the foregoing reasons the petition for writ of certiorari should be denied.

Respectfully submitted,

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February, 1969